

Silence means Dissent

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The European Parliament in Strasbourg will vote on Wednesday, if everything goes to plan, on initiating an Article 7 procedure against Hungary. Dutch Green MEP Judith Sargentini had presented a detailed report showing that there is no lack of reasons for this procedure. If the vote goes through, the Parliament will present on the basis of Sargentini's report a "reasoned proposal" to the Council which then has to decide by a four-fifths majority that Hungary poses a "clear risk of a serious breach" of the EU's fundamental values. In the case of Poland, the according proposal was formulated by the Commission, whose incumbent President Jean-Claude Juncker cannot hide his affection for his fellow Christian Democrat Viktor Orbán even while calling him, in the most tender and humorous way, a "dictator". It would therefore be a huge success if Parliament now stood up in defense of the Union and pressed the Article 7 button.

That has never been done before. And as it is with premieres: A lot can go wrong. It's uncharted territory. There is no jurisdiction. And so much is at stake.

One of the questions currently hotly debated in Parliament's administration right now, from what I hear, is quite interesting from a legal point of view: What actually happens if a considerable portion of Members cast an abstention? Are these just votes that do not count? Or are these votes that are counted as votes not in favour and therefore as votes against?

For the motion to go through, a two-thirds majority is required. No one seems to know for sure at the moment, though, how exactly this majority is determined. The wording of Article 178(3) of the Rules of Procedure of the European Parliament seems to suggest that abstentions are de facto votes in the negative: Silence means dissent. The previous, albeit sparse, practice, however, seems to suggest the opposite: Only Yes and No votes are to be counted, as the wording of Articles 231 and 354 TFEU speaks of a "majority of the votes cast".

The difference between both readings of the law can be decisive. Abstention is a particularly important option for the European People's Party, to which Orbán's Fidesz also belongs. The EPP Group is deeply divided: Many Scandinavian and Benelux MEPs criticise Orbán no less harshly than the Social Democrats, the Greens, the Liberals and the Left. But there is also a hard right wing made up of CSU, ÖVP, French Wauquiez republicans and other nationalist conservatives who are totally in love with Orbán. With their votes, faction leader Manfred Weber (CSU) wants to become the EPP *Spitzenkandidat* and Commission President, and he has no use at all for an escalation of the conflict nor for the loss of Hungarian votes.

++++++A Note from MPIL++++++

On Friday the 14th September 2018, the Max Planck Institute for Comparative Public Law and International Law will open its doors as part of the Max Planck Society's (MPG's) nationwide Max Planck Day. Inspired by the motto 'Research is curiosity – #whatareyoulookingfor', everyone interested is [invited to come to the institute](#) to find out about our history and our personnel, to discover our unique library and the work that we do, and to explore the role that research and researchers play in our societies.

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I can't even imagine what it would mean if the next President of the Commission were to owe his office to Viktor Orbán. Perhaps the uncertainty surrounding abstention also has its upside, too: This vote is the point at which the European Peoples Party and its leader must finally show their colours. Genteel reticence is not enough. Are you for Merkel? Or for Orbán? You can't be both, as France's President Macron rightly called out to the EPP wannabe *Spitzenkandidat*. He does have a point there, doesn't he?

Abstention for Krings

Just a brief comment on another matter: Next week, the German Bundestag will probably decide on who will succeed Justice Ferdinand Kirchhof in the First Senate at the Federal Constitutional Court and later, after Andreas Voßkuhle's term in the Second Senate runs out, become President of the Court. At the moment the odds-on favourite of the CDU/CSU parliamentary group seem to be a politician: Junior Home Secretary Günter Krings.

I've known Krings for many years, from my days as a newspaper journalist. He's a good guy, a clever, honourable, reasonable lawyer with whom I probably don't agree on many things, certainly not in his interpretation of the concept of marriage in Article 6 of the *Grundgesetz*, but that wouldn't be a sufficient reason for me to oppose his election as constitutional judge, of course.

That I *do* oppose his election, and quite vehemently so, has little to do with his person and convictions and a lot with his current office. He has been a major figure in the government since 2013. He has to identify himself *ex officio* with pretty much all of the Home Office's legal acts in such sensitive fields as security and migration policy. A large part of what will end up on the desk of the Karlsruhe Court has his fingerprints all over it. So tomorrow in Karlsruhe he'll be in charge of reviewing what he himself had helped enacting yesterday in Berlin?

That such a senior official from a key federal ministry would move to Karlsruhe without any cooling-off period at all – has this ever happened before? Ernst Benda

comes to mind, Federal Home Secretary in the late 60s and then President of the *Bundesverfassungsgericht* in the 70s. But in his case at least two years had passed after leaving office and before moving to Karlsruhe. We had a whole number of interior ministers at state level, even prime ministers, but state laws end up in Karlsruhe much less often than federal laws, so that is a lot less problematic.

In the business world, to join the board of directors after stepping down as CEO is seen as a breach of the corporate governance code in Germany. Which is not exactly comparable, of course. Nevertheless: what's wrong in corporate governance isn't right in constitutional governance. Particularly not in these constitutionally precarious times.

Standing up

So much for the coming week. In the last, arguably the biggest constitutional event was the ruling by the **Indian** Supreme Court that struck down as unconstitutional the infamous sec. 377 in the Criminal Code punishing gay sex and gave back liberty and dignity to the many millions of LGBTQ people in India. Our author MENAKA GURUSWAMY has decisively contributed to this decision as a lawyer – a huge congratulation from us! Hopefully, reports and comments on this epoch-making event will follow in the next week on these pages.

In **Germany**, the days of unrest in Chemnitz have shown how many people have no longer any problem at all to be seen alongside hard-core right-wing extremists and neo-nazis while shouting out their protest against Merkel and migrants. This is especially true for the AfD. While the head of the Federal Office for the Protection of the Constitution and the Prime Minister of Saxony still believe they can get away with asserting their continuous inability to recognize any sort of swastika at all by any stretch of the imagination, some state offices for the protection of the Constitution have taken the youth associations of the AfD under observation. What that means legally and what there is to say about the reaction of the AfD to swiftly dissolve these youth organizations under German party law, is written down by [SEBASTIAN ROSSNER](#) (German).

Speaking of parties: The **German** left-wing leader Sarah Wagenknecht has launched her cross-party movement "*Aufstehen*" (standing up) this week – an event which [CHRISTOPH GUSY](#) uses as an opportunity to share some fundamental thoughts about our ossified party law (German).

In **Spain**, the Supreme Court judge Pablo Llarena, the scourge of the Catalan separatist movement, was forced to travel to Belgium this week for being sued by the fugitive Catalan separatist chief Carles Puigdemont for a symbolic damages of 1 euro. [JORDI NIEVA-FENOLL](#) shows what constitutional and international damage the Belgian judiciary would do if it yielded to this request.

In **Argentina**, Parliament is working to liberalize the rigid abortion law, which [HELENA GUIMARÃES DE OLIVEIRA](#) compares to the corresponding development in Ireland.

In **France**, the two chambers of Parliament struggle about the controversial law against fake news. [THOMAS HOCHMANN](#) criticizes the way in which the law defines fake news, which still hold useful lessons, though.

In **Germany**, many call for restricting the access of rejected asylum seekers to the administrative court system. [REINHARD MARX](#) considers the special procedural law for asylum cases, that has evolved over the previous years, to be highly problematic in many respects, but transit centers with limited legal protection would, in his view, not work under European law (German).

In **Italy**, [MARIO SAVINO](#) looks back on the *Diciotti* affair and the equally brutal and successful refugee policy of Interior Minister Marco Salvini in the context of the European refugee crisis since 2011.

In **Ireland**, the High Court has now ruled on the fate of Mr Celmer – the Pole whose EU arrest warrant has recently written legal history before the ECJ – exemplifying the requirements from Luxembourg to clarify the Polish court's independence in dialogue, as [CILLIAN BRACKEN](#) reports.

Elsewhere

[GAUTAM BHATIA](#) analyzes the ruling of the **Indian** Supreme Court on the criminalization of same-sex sex.

[BOB BAUER](#) believes that Trump's Supreme Court nominee Brett Kavanaugh should recuse himself on the issue of **US** President's immunity, despite all his protestations to the contrary.

In the German state of **Hesse**, the state constitution of 1946 still contain a lot of outdated stuff, legally innocuous because of the primacy of federal law but an embarrassment nevertheless. This will now be corrected, albeit halfheartedly, according to [STEPHAN KLENNER](#) (German).

[MANUEL MÜLLER](#) is investigating the chances of the aforementioned EPP *Spitzenkandidat-Kandidat* Manfred Weber to become **EU** Commission President "for the grace of Orbán" (German).

[MARIA BERTEL](#) asks if the President of **Peru** has the right to initiate a constitutional referendum.

[BRIAN CHRISTOPHER JONES](#) proposes a three-part test on how to distinguish legitimate court criticism from attacks on the rule of law.

That's it for this week. For the next, we have prepared a special treat for all who wonder about Jean-Claude Juncker's "political commission". Now, as the end of Juncker's term draws near, it's time to take stock: Was that "political commission" a success? Has it helped the function of the Commission as guardian of the Treaties or, as many feared, harmed it? Together with MARK DAWSON of the Hertie School of Governance, we have organized an online symposium about "[Holding the Political Commission Accountable](#)", with contributions by ALBERTO ALEMANN, DIMITRY KOCHENOV, CATHRYN COSTELLO, ELSPETH GUILD, KENNETH ARMSTRONG, MARCO GOLDONI, DANIELA SCHWARZER und JORIS LARIK. We are very excited about this.

On a personal note: I am happy to announce that EVIN DALKILIC has agreed to join our team as an Assistant Editor – a very warm welcome to you, Evin! She has already proven her talent for creating great titles with her wonderful idea for Cillian Bracken's article: *Talk to me like Lawyers do!* (I'll be whistling that haunting tune forever now, so thanks for that, too...)

All the best, and take care,

Max Steinbeis

